

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-7518

TO BE ARGUED BY
RICHARD G. ASHWORTH

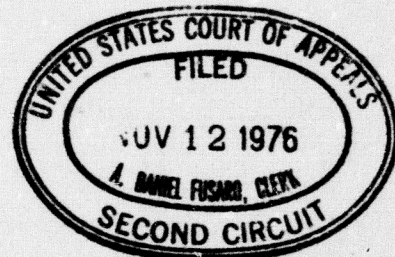
IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-7518

SCUNION SHIPPING INC., et. al.,
Plaintiffs-Appellees,
- against -
PARCEL TANKERS, INC., et. al.,
Defendant-Appellant.

On Appeal from the United States District Court for the
Southern District of New York

APPELLANT'S BRIEF



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SOUNION SHIPPING INC., et al.,
Plaintiffs-Appellees,
- against -
PARCEL TANKERS, INC., et al.,
Defendant-Appellant.

APPELLANT'S BRIEF

Statement of the Issues Presented for Review

1. Did the District Court err in entering final judgment on one of plaintiffs' claims without making an express determination that there was no just cause for delay until defendant's counterclaims were decided?
2. Was there just cause for delay in entering such final judgment?
3. Should enforcement of such judgment have been stayed?

Statement of the Case

Suit was commenced on August 19, 1976 in the United States District Court for the Southern District of New York by plaintiff-appellee Sounion Shipping Inc. ("Shipowner") and plaintiff-appellee Armco Financial Corporation AG ("Mortgagee") against defendant-appellant* Parcel Tankers, Inc. ("Charterer") claiming \$154,714 charterhire allegedly due under a timecharter of the m/t Stolt Argobay dated February 6, 1973 and claiming indemnity in the amount of \$1,000,000 for cargo damage claims pending against Shipowner and the Stolt Argobay, plaintiffs reserving the right to arbitrate their claims. Plaintiffs caused process of foreign attachment to issue against Charterer's bank accounts, which were released on August 25th (unless otherwise indicated, dates are in 1976) upon Charterer giving security in the amount of \$1,155,000.

An arbitration panel was then constituted, and on September 14th hearings on Plaintiffs' and Charterer's claims arising out of the charterparty were commenced. At the first hearing plaintiffs' counsel asked the arbitrators

*The suit was also in rem against subfreights of the Stolt Argobay, but jurisdiction was not obtained.

to order Charterer to pay charterhire, the payment of which Charterer had ceased on July 23rd on the ground that the Stolt Argobay was off-hire because she was unseaworthy and required repairs to restore her to condition to perform the service for which she was chartered. On September 16th the arbitrators issued an Interim Arbitration Decision (A. 80*) directing that Charterer pay full charterhire to date, without prejudice to any claim either party might present to the Panel for final award. Charterer, in a dilemma because its claims in arbitration against Shipowner exceeded the amount of the charterhire then due and because charterhire payments to Mortgagee cannot be recovered back but are subject to set-off of amounts due from Shipowner to Charterer, then filed its answer and counterclaims in the Court below, together with application for order to show cause (A. 56, why plaintiffs should not be required, pursuant to Supplemental Rule E(7) to the Federal Rules of Civil Procedure, to give security to respond to Charterer's counterclaims. At the hearing pursuant to the show-cause order before District Judge LEE P. GAGLIARDI on September 24th Charterer's dilemma was discussed, and the Court inquired as to what the arbitrators' views were. The question was put later that day to the arbitrators, who issued a 2-to-1 Opinion (A. 103) that evening,

*Numbers in parenthesis identified by "A" refer to pages in Joint Appendix.

Friday, September 24th. On Monday, September 27th, Charterer forwarded the arbitrators' Opinion to Judge GAGLIARDI, and Mortgagee submitted the form of judgment which it sought to have entered on the Interim Arbitration Decision. Pursuant to Judge GAGLIARDI's direction at the second hearing, held on September 28th, Charterer submitted to the Court a proposed order regarding counter security and request for delay of entry of judgment or, in the alternative, stay of execution thereof (A. 133).

On October 7th Judge GAGLIARDI filed his Memorandum Decision (A. 5) denying counter security and stating that Mortgagee was entitled to enter judgment on the interim arbitration decision. Judgment in the amount of \$225,513.89 (A. 3), providing for execution within ten days after entry (unless stayed by appeal) was filed on October 12th, and notice of appeal therefrom was filed on October 15th, together with supersedeas bond, on the basis of which the Clerk directed that execution be stayed.

On October 28th Shipowner moved to dismiss the appeal on the ground of lack of jurisdiction or in the alternative for summary affirmance, which motion was heard on November 3rd before Judges MOORE, FEINBERG, and MESKILL, who referred the motion to the panel which would hear the appeal, and ordered an accelerated briefing schedule.

Statement of Facts

The sequence of proceedings recited in the foregoing Statement of the Case includes the salient facts of the case. No stenographic record was made of the two hearings before Judge GAGLIARDI, and no testimony or exhibits were introduced in evidence..

The underlying disputes which gave rise to this suit and arbitration revolve around the charterparty requirements for maintenance of the Stolt Argobay by the Shipowner. After a series of interruptions and delays in performance and an increasing number of instances of cargo contamination, Charterer put Shipowner on notice on June 21st that unless certain specified deficiencies were corrected, the Stolt Argobay would be put off-hire at the end of the current voyage in July, at Rotterdam (A. 82). Further instance of cargo contamination occurred on that voyage, and when inspection by Charterer's representatives at Rotterdam revealed that the listed deficiencies remained outstanding, Charterer declined to pay Mortgagee the advance installment of charterhire due on July 23rd, the day after completion of discharge of cargo.

Shipowner insisted that there were no deficiencies, that it had corrected any that had existed, and that certain of the deficiencies asserted by Charterer were not for

Shipowner's account under the terms of the charterparty, and that in any event Charterer was obliged to continue to pay hire and submit any disputes to arbitration. Charterer nominated an arbitrator, and the parties continued to dispute their various assertions until plaintiffs commenced their action in the Court below on August 19th.

Following the issuance of the Interim Arbitration Decision on September 16th, the parties continued the arbitration of Charterer's claims, which are those asserted in its counterclaim in the Court below (A. 26): that the Stolt Argobay has been off-hire since July 23rd because of unseaworthiness and inability to perform as the parcel tanker for which she was chartered, for loss of time because of cargo contamination and slow pumping, for loss of revenue because of unseaworthiness to carry the special cargoes which the Stolt Argobay was chartered to carry, for miscellaneous expenses resulting from the unseaworthy condition of the vessel, and for indemnity in the event of any cargo damage recovery from Charterer in its capacity as voyage charter or bill of lading carrier. Exclusive of the off-hire claim (which is, of course, identical in amount with plaintiffs' claim for payment of hire) and the indemnity claim, Charterer's foregoing claims in arbitration total \$233,002.93. There were a total of 25 arbitration

hearings extending over the period September 14th through October 15th, 14 witnesses testified, the transcript totalled 2,570 pages, and there were 175 exhibits. Submission of briefs to the arbitrators on Shipowner's and Charterer's claims was completed on November 1, 1976; the final award of the arbitrators has not yet been rendered.

The foregoing brief summary of the arbitration proceedings is perforce without reference to the Record in the Court below, since the arbitration went forward concurrently with the proceedings before Judge GAGLIARDI and the appeal therefrom to this Court. We expect that appellees will confirm the accuracy of our description, on the understanding that we are not asking this Court to consider these matters with respect to the merits of either side's claims and contentions.

Jurisdiction of this Appeal

At oral argument of appellees' motion to dismiss the appeal for lack of jurisdiction Judge FEINBERG adverted to the principle that a decision disposing of only one of multiple claims is not final and therefore not appealable, in the absence of the District Court's "express determination that there is no just reason for delay" (FRCP 54(b)).

However, in response to Judge Feinberg's question counsel for appellees expressly disavowed reliance* upon non-finality, doubtless because of appellees' intent to enforce the judgment by execution.

The thrust of this appeal on the merits is whether it was error to make the judgment entered upon the Interim Arbitration Decision "final". If the judgment entered had not been "final", there would have been no need for this appeal, because what appellant is concerned with is the levying of execution upon this quarter-million-dollar judgment prior to determination of appellant's counterclaims. "An execution ordinarily may issue only upon a final judgment", and, as further observed in Redding & Co. v. Russwine Constr. Corp., 417 F2d. 721, 727 (D.C. Cir., 1969), "the role Rule 54(b) plays with reference to the finality of a judgment for the purposes of execution as well." The judgment, therefore, is a "final" decision of the District Court over the appeal from which this Court has jurisdiction under 28 USC §1291.

There are numerous decisions on the question of

*Appellees' memorandum in support of their motion to dismiss the appeal urges non-appealability because the judgment was entered on an (interim) arbitration award and because Judge GAGLIARDI's denial of counter security was (as is not contested) a non-appealable order.

whether the determination of one of multiple claims in litigation is or is not final, depending upon whether the district court has expressly determined that there is no just reason for delay and directed entry of judgment, see 6 Moore's Federal Practice (2d Ed.), para. 54.32 et seq. Formerly, the problem was taken care of by the doctrine of Forgay v. Conrad, 6 How. 201 (1848), but following the amendment of FRCP 54(b) in 1946 it is generally viewed that adjudication of only one of multiple claims is not "final" in the absence of the required determination by the district court that there is no just reason for delay in entry of judgment, and Moore suggests that the absence of such a determination and direction may be remedied by mandamus or writ of prohibition (op. cit., p. 492).

In the present case, however, such resort to extraordinary writ is unnecessary, because by its entry of judgment providing for execution within ten days the District Court (erroneously, it is submitted) made its judgment "final" and thus appealable. Decisions as to appeal from partial summary judgment under Rule 56(d) hold that it is interlocutory and non-appealable, unless the court has entered a final judgment upon which execution may be levied, as in Biggins v. Oltmer Iron Works, 154 F2d 214, 217 (7th Cir. 1946):

"We are thus faced with a novel and difficult problem. We are unable to find any authority in point or which materially assists in its solution. Ordinarily a judgment is final when its satisfaction can be aided by execution. On the other hand, a final judgment is usually defined as one which disposes of the entire controversy. Cases supporting both propositions are noted in *City of Louisa v. Levi*, 6 Cir., 140 F.2d 512, 514. As previously stated, execution was ordered upon the instant judgment and no doubt defendant's property was subject to seizure in satisfaction thereof. At the same time, part of plaintiff's claim remains in litigation.

"The judgment must be treated either as final or interlocutory. If the latter, it is subject to review only upon the entry of a judgment disposing of the entire claim. In the meantime, the property of defendant could be seized and sold in satisfaction. Defendant's right to review under such circumstances would be of doubtful value. With its property gone, a reversal would mean little more than an invitation to another lawsuit. Neither the law generally nor the Rules of Civil Procedure contemplate such an incongruous result.

"A practical as well as a legal view of the situation leads us to the conclusion that the judgment is final and appealable. *Kasishke et al. v. Baker*, 10 Cir., 144 F.2d 384, 385, 386. The fact that defendant's property may be seized in satisfaction of the judgment furnishes persuasive support for this conclusion.

"The motion to dismiss the appeal is therefore denied."

Biggins was relied on in Wynn v. Reconstruction Finance Corp., 212 F.2d 953, 956 (9th Cir. 1954), for the following proposition:

"A further and necessary exception to the non-appealability of a partial summary judgment is made where the District Court has erroneously treated such judgment as final and orders execution thereon."

We submit that the final judgment entered below is appealable under 28 USC §1291. If, however, this Court should disagree, then we respectfully request that this appeal be considered an application under 28 U.S.C. §1651 for a writ of mandamus directing Judge GAGLIARDI to make a determination as to whether there was "no just reason for delay" in the entry of the judgment and, if he so determines, whether the interests of justice require stay of enforcement under Federal Rule of Civil Procedure 62(h) or, in the alternative, directing Judge GAGLIARDI either to vacate the judgment or amend it to provide for stay of execution pending determination of Charterer's counterclaim.

APPELLANT'S ARGUMENTPOINT I

THE DISTRICT COURT ERRED IN ENTERING FINAL JUDGMENT ON ONE OF PLAINTIFFS' CLAIMS WITHOUT MAKING AN EXPRESS DETERMINATION THAT THERE WAS NO JUST CAUSE FOR DELAY UNTIL DEFENDANT'S COUNTERCLAIMS WERE DECIDED.

When more than one claim for relief is presented in an action, Rule 54(b)* of the Federal Rules of Civil Procedure permits a district court to direct the entry of final judgment on one claim "only upon an express determination that there is no just reason for delay".

In the present case Charterer has counterclaimed, the Court below directed entry of final judgment on one of plaintiffs' claims, and the Court below failed to make any

*"JUDGMENT UPON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties."

determination as to whether there was reason for delay.

Q.E.D.: the entry of such judgment was in violation of Rule 54(b).

The action involves multiple claims.

In the motion to dismiss this appeal Shipowner argues that there is only one claim, but the fact is otherwise. Plaintiffs sued and defendant counterclaimed; all claims were submitted to arbitration; and the arbitrators' Interim Decision, and the judgment entered thereon, dealt only with one of plaintiffs' claims. The arbitrators provided that this preliminary ruling was without prejudice to other claims of both sides to be considered and dealt with in their final award (A. 81).

The judgment entered was a final judgment.

One could theorize that the judgment entered below cannot be a final judgment because Judge GAGLIARDI failed to make the express determination which is required before a judgment on one of multiple claims can properly be considered final. However, for the reasons noted supra in our discussion of this Court's jurisdiction, it is clear that the judgment below is "final", because it provides for execution within ten days. Unless this Court reverses, Charterer will have to pay approximately a quarter of a million dollars as soon as the stay invoked by the supersedeas bond on appeal is lifted.

No "express determination that there is no just reason for delay" was made.

There was indisputably no "express" determination by the Court below as to delay, although Charterer specifically requested that such a determination be made (A. 134). Even if it is argued that by entering a final judgment Judge GAGLIARDI impliedly determined that there was no just reason for delay, the specific requirement of the Rule is not met. If, arguendo, it were considered to have been met, we then come to the next point of Charterer's argument: there was, indeed, just cause for delay in this case, any determination to the contrary would be error, and the entry of a final judgment was error.

POINT II

THERE WAS JUST CAUSE FOR DELAY IN ENTERING FINAL JUDGMENT.

The present case is a typical charterparty dispute where Shipowner and Charterer each has claims against the other arising out of the vessel's performance under the charter, and the mutual claims are submitted to arbitration. One of Shipowner's claims was that charterhire withheld by Charterer be paid, and at the first hearing the arbitrators issued their Interim Decision requiring Charterer to pay charterhire in accordance with the terms of the charter,

but without prejudice to the claims of either party on final award.

As it happened, however, Shipowner had assigned its right to be paid charterhire to its Mortgagee, under an arrangement whereby Charterer was entitled to set-off against that charterhire amounts due it from Shipowner, but once having paid Mortgagee, Charterer would have no right to recover back on account of claims against Shipowner (A. 51). Charterer, therefore, was faced with the problem of having to pay charterhire to Mortgagee and possibly being unable to recover it back in the event Charterer obtained a final award against Shipowner, which was admittedly (affidavit in support of motion to dismiss appeal) in financial difficulties.

This very real problem was brought to the attention of the arbitrators, and Charterer urged them to rule that any payment of charterhire be "received by the Mortgagee named in the Charter Party subject to agreement that if the Panel subsequently determines that Charterer is entitled to an award that so much of said payment as is necessary to satisfy that award will be refunded by the Mortgagee" (A. 103). A majority (two of the three) of the arbitrators did so conclude: "the Charterers are entitled to attach the requested condition to the hire payment they will make." (id., emphasis added)

Based upon the foregoing Opinion of the arbitrators, Charterer made formal tender to Shipowner and Mortgagee to pay the full hire without deduction on account of the amounts Charterer claimed due to it from Shipowner, on condition that Mortgagee agree to refund whatever portion of such payment as might be necessary to satisfy any final arbitration award in Charterer's favor against Shipowner (Exhibit 2 to affidavit in opposition to motion to dismiss the appeal). Mortgagee refused to agree to this condition (affid. cit., para. 5).

Notwithstanding the arbitrators' Opinion elucidating the intent of their Interim Arbitration Decision and notwithstanding Charterer's offer to pay full hire without set-off provided Mortgagee would agree to make refund if Charterer prevailed on its claims in arbitration, Judge GAGLIARDI entered the final judgment submitted by counsel for Mortgagee.

This was, we submit, error under the circumstances of this case, because there was every reason to delay entry of judgment until the arbitrators' final award was handed down, and it could be determined whether Charterer's set-off exceeded the charterhire due. As stated by the Court of Appeals for the Third Circuit in TPO Inc. v. F.D.I.C., 47 F.2d 131, 134 (1973):

"The opinion is in accord with other authority which questions the advisability of the entry of judgment against one party if it appears that ultimately he may recover judgment against the moving party after trial. See 3 Barron & Holtzhoff, Federal Practice

& Procedure, §1241. Particular caution also must be exercised when the claim and counter-claim are so closely related that an issue of fact in one may prove to be important to both.

"We see no special circumstances in the record which would favor the entry of judgment in favor of TPO at this time when it is possible that subsequent litigation may require a return of the sum awarded and perhaps additional monies. See Rule 54(b), 3 Moore's Federal Practice §13.16."

POINT III

ENFORCEMENT OF THE JUDGMENT SHOULD
HAVE BEEN STAYED.

Charterer submitted three alternative applications to the Court below: requiring plaintiffs to give security to respond to defendant's counterclaims (FRCP, Supp. E(7)), delaying the entry of judgment until conclusion of the arbitration (FRCP 54(b)), or entering judgment but staying its enforcement (FRCP 62(h)). The first request, requiring counter-security under Supplemental Rule E(7), was denied, erroneously in our view, but that decision is not appealable (and is not raised on this appeal). We have discussed in the previous points of this argument Charterer's application for delay of entry of judgment.

Charterer's third application was pursuant to Rule 62(h) of the Federal Rules of Civil Procedure, which provides:

"STAY OF JUDGMENT AS TO MULTIPLE CLAIMS OR MULTIPLE PARTIES. When a court has ordered a final judgment under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered."

Charterer made the following application (A. 132) for stay of enforcement of judgment (if the Court determined to enter judgment):

"ORDERED that execution of this judgment be stayed pending the occurrence of any one of the following:

(1) plaintiffs giving security in the usual amount and form to respond in damages to the claims set forth in defendant's counterclaim; or

(2) plaintiffs agreeing in writing to refund so much of any payment made by defendant pursuant to the judgment as is necessary to pay any arbitration award in defendant's favor; or

(3) the entry of judgment on an arbitration decision finally determining all of plaintiffs' and defendant's claims."

This Court will note that the first and third events correspond with Charterer's applications under E(7) and 54(b), the outcome of which Charterer could not know when its proposal for stay was submitted. The third proposed condition, for a 62(h) stay, tracks the wording of the arbitrators' Opinion (A. 103) elucidating their Interim Decision.

The Memorandum Decision of the Court below (A. 5)
does not even refer to Charterer's application for a stay
pursuant to FRCP 62(h) or to the arbitrators' Opinion. A
stay under Rule 62(h) is unquestionably discretionary
("the court may stay enforcement"), but, we submit, the
Court below failed to exercise its discretion. Examination
of that portion of the Court's opinion relating to the entry
of judgment (A. 7) shows that Charterer's request for a
stay was not considered; the judgment entered by the Court
(A. 3) was the form submitted by plaintiffs (A. 105), not
one prepared by the Court. This is either failure to
exercise or, in the more familiar term, abuse of discretion.
Failure to exercise discretion is, like abuse of discretion,
subject to review by this Court.

"If the trial judge has failed to exercise his discretion at all, as when he is under the mistaken apprehension that he has no power to grant the relief sought, the appellate court can review and can order him to exercise his discretion." 11 Wright & Miller on Federal Practice and Procedure 118-119.

"Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." Foman v. Davis, 371 U.S. 178, 182 (1962).

"We recognize that a motion under Fed.R.Civ.P. 60(b) is addressed to the sound discretion of the trial court. However, the mere outright refusal of the motion, without any justifying reason apparent from the record before us, requires that we conclude that the refusal was in error." Shabarekh v. City of Miami, 443 F.2d 992, 994 (5th Cir., 1971).

We submit that under the circumstances of this case it was an abuse of discretion not to stay enforcement of the judgment in the absence of agreement by Mortgagee to repay so much of any charterhire payment by Charterer as might be necessary to pay a final arbitration award in Charterer's favor. Having decided not to require counter security and having determined to enter Judgment on plaintiffs' claim before the arbitrators' decision on defendant's counterclaim, the Court below should have given effect to the Opinion of the majority of the arbitrators that the charterhire payment directed by them in their Interim Decision should be conditioned upon Mortgagee's agreement to refund if the arbitrators' Final Decision would result in a set-off in Charterer's favor. Even in the absence of such Opinion of the arbitrators, we submit, fairness and equity compels such a requirement. The Court below clearly erred in failing to exercise its discretion to provide such a stay of enforcement.

CONCLUSION

THE JUDGMENT ENTERED BELOW SHOULD
BE VACATED, WITH THIS COURT'S
DIRECTION ON REMAND TO THE DISTRICT
COURT TO DELAY ENTRY, OR IN THE
ALTERNATIVE TO STAY ENFORCEMENT,
OF JUDGMENT PENDING FINAL
ARBITRATION DECISION.

Respectfully submitted,

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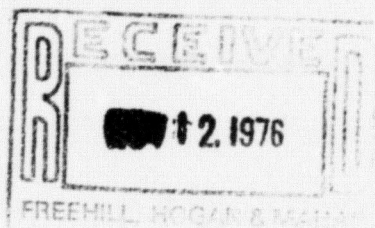
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